

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DAVID GEORGE BORETTI,

Petitioner,

Civil Case No. 02-74648

HONORABLE PATRICK J. DUGGAN

v.

KENNETH MCGINNIS,

Respondent,

**ORDER DENYING CERTIFICATE OF APPEALABILITY**

At a session of said Court, held in the U.S.  
District Courthouse, Eastern District  
of Michigan, on April 19, 2006.

PRESENT: THE HONORABLE PATRICK J. DUGGAN  
U.S. DISTRICT COURT JUDGE

Petitioner David George Boretti filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, which this Court dismissed without prejudice on November 10, 2003, concluding that Petitioner failed to exhaust all available state court remedies prior to filing his habeas petition. On March 13, 2006, Petitioner filed a motion to amend the Court's judgment. The Court denied Petitioner's motion on March 27, 2006. Petitioner now seeks to appeal the Court's decisions and therefore requests a certificate of appealability from this Court. 28 U.S.C. § 2253.

Section 2253 provides that a certificate of appealability may issue only if a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. §

2253(c)(2). As the Supreme Court has stated:

“[T]he petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner] or that the questions are ‘adequate to deserve encouragement to proceed further.’”

*Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 3394 n.4 (1983)(quoting *Gordon v. Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980)). As the Supreme Court recently stated, when a district court denies a habeas petition on the merits of the claims, a certificate may issue if the petitioner demonstrates that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 520 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). However, when a district court denies habeas relief on procedural grounds without reaching the petitioner’s constitutional claims, a certificate may issue if the petitioner shows that jurists of reason would find it debatable whether (1) the petition states a valid claim of a denial of a constitutional right; *and* (2) the district court was correct in its procedural ruling. *Id.* at 484-85, 120 S. Ct. at 1604.

This Court dismissed Petitioner’s application for a writ of habeas without prejudice because Petitioner failed to first exhaust his state court remedies. The Court denied Petitioner’s motion for relief from judgment because it found no defect in its prior decision. Petitioner fails to establish that this procedural ruling was incorrect.

Accordingly, the Court holds that Petitioner is not entitled to a certificate of

appealability and DENIES the request.

**SO ORDERED.**

s/PATRICK J. DUGGAN  
UNITED STATES DISTRICT JUDGE

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William Campbell, AAG